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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

AUCLAIR TRANSPORTATION, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal from the United States District Court for the District of Massachusetts

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Auclair Transportation, Inc., Gay's Express, Inc., Graf Bros., Inc., H. P. Welch Co., Alvin R. Holmes d/b/a Holmes Transportation Service and/or Jones Express, J. E. Faltin Motor Transportation, Inc., Law Motor Freight, Inc., P. S. Dubrey Trucking Co., Taylor's Express Co., and American Trucking Associations, Inc., appeal from the judgment of the United States District Court for the District of Massachusetts entered on September 11, 1963, dismissing their complaint to set aside an order of the Interstate Commerce Commission, dated October 5, 1962, authorizing the performance of motor

carrier operations by Railway Express Agency, Inc., a wholly-owned affiliate of certain railroads. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 221 F. Supp. 328 (adv. sheets), and copies of the opinion and judgment are attached hereto as Appendix A. A copy of the report of the Interstate Commerce Commission in *Railway Exp. Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311,[1] and a copy of its unreported order are attached hereto as Appendix B. The report of division 1 of the Interstate Commerce Commission in *Railway Exp. Agency, Inc., Extension—Newport, Vt.*, 84 M.C.C. 435, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to suspend, enjoin, annul and set aside the report and order of the Interstate Commerce Commission, dated October 5, 1962. The judgment of the District Court for the District of Massachusetts was entered September 11, 1963, and notice of appeal was filed in that court November 5, 1963. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in the case: *United States* v. *Drum*, 368 U.S. 370; *American Trucking Associations, Inc.* v.

[1] This report embraces five consolidated cases, MC-66562 (Sub No. 1515, 1577, 1594, 1595, and 1687). Three of these proceedings (Sub Nos. 1577, 1594, and 1595) were the subject of an earlier report of division 1 of the Commission (see Appendix C).

United States, 364 U.S. 1; *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 5(2)(a) and (b), 206(b), 207(a), and 208(a) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(a) and (b), 306(b), 307(a), and 308(a), are set forth verbatim in Appendix D hereto.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in the absence of "special circumstances" such as disclosed in *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141, may authorize Railway Express Agency, Inc., a wholly-owned railroad subsidiary, to conduct motor common carrier operations not restricted to traffic having an immediately prior or subsequent movement by rail?

2. Whether the District Court correctly concluded that the Commission had made a finding of "special circumstances" justifying motor operations by a railroad affiliate without a "rail-haul" restriction?

3. Whether the Commission, under Section 5(2)(b) of the Interstate Commerce Act and the national transportation policy, may treat Railway Express differently than other rail-affiliated motor carriers and authorize it to perform motor operations functionally unrelated to those of its rail parents?

4. Whether the Commission, under Section 207 of the Interstate Commerce Act, may find that the public convenience and necessity require operations by the rail-subsidiary applicant as a common carrier by motor vehicle of "general commodities moving in express service," although refusing to apply its long-standing definition of "express service" to the proposed service?

5. Whether the Commission, despite its uniform and long-standing interpretation of the "rail-haul" restriction contained in numerous motor carrier certificates issued to railroads and their affiliates, may lawfully change that interpretation so as to bestow upon Railway Express, as to hundreds of certificates already issued, greatly enlarged operating rights?

STATEMENT

Railway Express Agency, Inc., hereinafter called REA or Railway Express, is a Delaware corporation organized by the principal railroads of the country in 1928; its capital stock is wholly owned by such railroads; and it operates under an agreement to which most of the country's railroads, including the owning railroads, are parties. REA engages in substantial operations by motor vehicle in the pickup, delivery, transfer, and line-haul movement of express throughout the United States, utilizing in excess of 12,000 motor vehicles in such operations. Appendix B, p. 45, *infra* Since the 1939 decision of the Commission in *Railway Exp. Agency, Inc., Determination of Status*, 21 M.C.C. 161, establishing which of its motor vehicle operations fall within certain of the partial exemptions and which are subject to full economic regulation under part II of the Interstate Commerce Act, Railway Express had filed, at the time of the Commission's report herein, approximately 1,700 applications for motor carrier authority, 254 of which were filed in 1960 and 1961. Appendix B, p. 54, *infra*

By a series of five applications filed under Section 206(b) of the Interstate Commerce Act, 49 U.S.C. § 306 (b), Railway Express sought authority from the Interstate Commerce Commission (Commission) to engage in transportation in interstate and foreign commerce as a common carrier by motor vehicle of general commodities, including class A and B explosives, moving in express

service, over designated regular routes in Massachusetts, New Hampshire, Vermont, Maine, and New York, as more fully described in the appendix to the Commission's decision, which is appended hereto as Appendix B.

After hearing, each of the applications was the subject of a favorable report and recommended order by a Joint Board or Hearing Examiner, and exceptions were duly taken by various appellants here. American Trucking Associations, Inc., the appellant association, was permitted to intervene in these proceedings at various stages.

Three of the applications (Sub-Nos. 1577, 1594, and 1595) were the subject of a single report and order of division 1 of the Commission, Appendix C hereto, and, on petition by protestants therein, the Commission reopened those proceedings on its own motion and assigned all five proceedings for oral argument. By its report and order dated October 5, served October 24, 1962, Appendix B hereto, the Commission authorized Railway Express to perform transportation as a common carrier by motor vehicle of general commodities moving in express service, over the routes and between the points sought, subject to certain conditions.[2]

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[2] The authority granted in MC-66562 (Sub-Nos. 1515, 1577, 1594, and 1595) was made subject to conditions 1-4 below, and the authority granted in MC-66562 (Sub-No. 1687) was made subject to conditions 1, 3, 4, and 5 below.

1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of express service of the Railway Express Agency.
2. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.
3. The authority granted herein, to the extent it authorizes the transportation of dangerous explosives, shall be limited, in point of time, to a period expiring 5 years from the the date of the certificate.
4. Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a service which is auxiliary

The District Court dismissed the complaint of appellants, finding that the order of the Commission is supported by substantial evidence and is in accord with the mandate of the Interstate Commerce Act, and that the Commission was not required to include in the certificates a restriction limiting transportation thereunder to shipments having a prior or subsequent movement by air or rail.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding involves more than the grant of five applications of Railway Express to perform unrestricted motor carrier operations; it is recognized by all parties as a representative proceeding which will set the pattern for future motor carrier grants to Railway Express. The prefatory paragraph of the Commission's report characterizes the importance of this proceeding:

> The performance of express service by motor vehicle has long presented unique regulatory issues. Pending before us is a large volume of applications by applicant (REA) seeking authority to operate as a common carrier by motor vehicle of general commodities moving in express service. These five applications, representative of numerous others, present the broad regulatory problem of defining generally the circumstances in which, and the conditions and limitations under which, applicant properly may be allowed to engage in such operations. The character of the services now provided and here-

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to or supplemental of express service of the Railway Express Agency.

5. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement in express service of the Railway Express Agency.

> in proposed to be rendered by REA has generated unusual interest throughout the independent motor carrier industry generally, and existing motor common carriers of general freight have expressed recently a growing concern over REA's "invasion of the field of motor carrier operations." In these circumstances, we deem it necessary and desirable to utilize the instant proceedings as a vehicle for the reappraisal and restatement of the requirements and policies which we believe should obtain with respect to grants of motor carrier operating rights to REA. Appendix B, pp. 40-41, *infra*

Nor is it only future grants of motor carrier operating authority to Railway Express which will be affected by this decision. For the first time in its report here, the Commission has substantially relaxed the definition of the "rail-haul" condition[3] attached to numerous outstanding Railway Express motor carrier certificates and, as a result and without any evidence of public need for additional service, has authorized operations thereunder of greatly increased scope.

1. The National Transportation Policy states a Congressional purpose to recognize and preserve the inherent advantages of each mode of transportation, and in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 428 (1951), this Court noted with approval the Commission's application of that policy "so as to read the proviso [of § 5(2)(b)] into § 207 in order to preserve the inherent advantages of motor-carrier service." The proviso of § 5(2)(b) forbids the approval of acquisitions by railroads or railroad affiliates of motor carrier operations except on a finding by the Commission, among others,

[3] "[A] requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail." Appendix B, p. 65, *infra*

that the proposed transaction will enable the railroad "to use service by motor vehicle to public advantage *in its* [rail] *operations.*" The emphasized phrase has been translated by the Commission as empowering it to authorize rail operations of motor vehicles "confined to service auxiliary and supplementary to that performed . . . in its rail operations," *Pennsylvania Truck Lines, Inc.—Control —Barker*, 1 M.C.C. 101, 113 (1936), but not permitting approval of all-out truck service competitive with that of independent motor carriers or that of the railroads themselves.

This Court recently summarized the present state of the law with respect to motor carrier operations by railroads in *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1, 7 (1960), hereinafter called the *A.T.A.* case, and concluded:

> Thus it is evident that the policy of opposition to railroad incursions into the field of motor carrier service has become firmly entrenched as a part of our transportation law. Moreover, this general policy fortunately has not been implemented merely by way of a more or less unguided suspicion of railroad subsidiaries, but rather has evolved through a series of Commission decisions from embryonic form into a set of reasonably firm, concrete standards. [Footnote omitted]

Even though the clear Congressional policy, with one exception noted hereinafter, limits motor carrier operations of railroads to those usable to public advantage in their rail service, the Commission here decided to approve grants of motor carrier authority without such restrictions on the theory that Railway Express stands in a different posture from other rail-affiliated motor carriers because it operates as an express company. The Commission stated the rationale of its decision as follows: "while the motor carrier operations of a railroad or its

subsidiary must be auxiliary to or supplemental of rail service, REA's motor carrier service is auxiliary to or supplemental of its *express* company service." Appendix B, p. 67, *infra* The Commission cited no statutory basis for the distinction it made between Railway Express and other rail-affiliated motor carriers, nor could it since the policy was designed to limit railroads to motor carrier operations usable in their *rail* operations. Neither did the Commission point to any decisional precedents for such a distinction, although it retrospectively assigned significance to certain variations in the language of the restrictions, and sought to rationalize the absence of cases recognizing the distinction by stating that Railway Express cases "lack the comprehensive discussions of the restrictions found in the [usual rail-affiliate decisions], leaving, in fact, a void as to certain specifics illuminative as to the meaning of the REA restrictions." Appendix B, p. 66, *infra*

The one exception to the rule against Commission approval of unrestricted motor-carrier operations by a railroad or a railroad affiliate is the "special circumstances" test, and what constitutes such special circumstances is spelled out in *Rock Island M. Transit Co. Com. Car. Application*, 63 M.C.C. 91, 102 (1954), aff'd 355 U.S. 141 (1957): To receive unrestricted authority, the rail affiliate must not only establish that the grant of authority has not and will not result in undue restraint of competition, but it must also prove "that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience."

2. The District Court's affirmance of the grant of certificates without rail-oriented restrictions was not based on the Commission's theory of the unique position of Railway Express, but rather was grounded on the "special circumstances" test: "In this proceeding the Commission

has in fact found the necessary special circumstances." Appendix A, p. 36, *infra* But when reference is made to the portion of the Commission's report cited by the Court (91 M.C.C. at 340, Appendix B, p. 83, *infra*), it is clear, although the Commission's language is not so trenchant as could be desired, that it did not make a finding that "special circumstances" exist which justify granting the authority sought without the auxiliary-and-supplemental-to-rail restrictions.

The portion of the report cited by the Court begins at 91 M.C.C. 339, Appendix B, p. 82, *infra*, with the statement by the Commission that the implementation of the policy expressed in § 5(2)(b) is "designed to relate properly the motor vehicle operations authorized to the operations of the rail *or rail-controlled* carrier on whose behalf they are conducted." This represents a gross overstatement of the purposes of the policy expressed in § 5(2)(b) and it would nullify the Congressional intent stated in the National Transportation Policy, to "recognize and preserve the inherent advantages of" each mode of transportation. The Commission stated the purpose as permitting the relation of the rail affiliate's operations to the operations of the rail affiliate: but this is no limitation. Even assuming that a thing can be auxiliary to or supplemental of itself, limiting the motor operations of Railway Express to Railway Express's operations will not prevent "railroad incursions into the field of motor carrier service," which this Court stated, in the *A.T.A.* case, *supra*, at 364 U.S. 7, as the purpose of the policy. The correct means of implementing that policy was stated by the Court in the *A.T.A.* case at 364 U.S. 9:

> The key phrase in this summary is obviously "auxiliary to or supplemental of train service." If a trucking service can fairly be so characterized, it is clear enough that there is compliance with the mandate of § 5(2)(b) that the carrier should be able "to use service by motor vehicle to public advantage

> *in its operations.*" But if, on the other hand, the motor transportation is essentially unrelated to rail service, the railroad parent is invading the field of trucking, and, under normal circumstances, the National Transportation Policy is thereby offended.

Basing its reasoning on its misapprehension of the scope of the statutory language, the Commission concluded that the motor vehicle operations of Railway Express must relate to its activities as an *express company*. Then it stated:

> When REA seeks to institute motor vehicle operations which are not auxiliary to or supplemental of those of the express company then, for it to succeed, it must show that special circumstances exist. For example, if REA should seek to render an irregular-route service, which service, as we have noted, has not been considered to be in the nature of an express service, it would appear that special circumstances would have to be shown in order for such application to be granted. Also, because the express company is affiliated with the railroads within the meaning of section 5(2)(b), we believe that special circumstances must exist in order for REA to obtain a certificate authorizing motor vehicle operations wholly disassociated from rail operations. However, we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist. Appendix B, p. 83, *infra*

It is evident that the Commission was not making a finding of "special circumstances" in the sense of the *Rock Island* test, *supra*. Its decision to grant authority without the usual rail-oriented restrictions was predicated on the conclusion that those operations must relate, not to the rail operations of the owning railroads, but to the operations of the *express company*. Only incidentally did it refer to Railway Express's railroad affiliation, and not as a basis for approval of the grants in the form made. Even in this respect, however, it stated the law more broadly

than it has been developed through the line of Commission and court decisions, since it spoke of special circumstances justifying motor operations "wholly disassociated from rail operations," whereas past decisions require "special circumstances" to be shown to justify *any* relaxation of the "auxiliary to and supplemental of rail operations" standard.

The Commission's discussion of the restrictions used to implement the anti-monopoly policy emphasizes that the grants here were based on the supposed unique position of Railway Express rather than on "special circumstances" in the *Rock Island* sense. Thus, it said:

> The emphasized words [in certain of the restrictions] are symbolic of the difference between the purpose of the REA restrictions and the purpose of the corresponding restriction shown in the PMT illustration above: while the motor carrier operations of a railroad or its subsidiary must be auxiliary to or supplemental of rail service, REA's motor carrier service is auxiliary to or supplemental of its *express* company service. Appendix B, p. 67, *infra*

And specifically with respect to the "rail-haul" restriction, the Commission refused to apply its long-standing interpretation that such a restriction requires an *immediately* prior or subsequent rail movement, even where the word "immediately" is not included in the restriction,[4] but rather concluded that Railway Express certificates containing such a restriction may be "tacked" together, provided only that "the traffic thereunder is not transported in a wholly motor movement." Appendix B, p. 72, *infra*

Summarizing its discussion of the meaning of the restrictions in Railway Express certificates, the Commission

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[4] *New England Transp. Co. Extension—Cement*, 88 M.C.C. 703, 706 (1962); *Reading Transp. Co.—Control and Merger—Karn's Transfer Co.*, 93 M.C.C. 11, 19 (1963).

stated that it is not accurate to refer to Railway Express's motor operations as substituted motor for rail service, "for what REA is actually performing is a line-haul motor vehicle operation on its own behalf to replace train service which it, as an express company, formerly utilized." Appendix B, p. 73, *infra*[5] That is, the test is not whether the motor operations are usable in the parents' rail operations as the statute requires, but whether they are usable in the affiliate's operations as an express company. If the statute is construed to mean that rail affiliates' motor service need only be restricted to that auxiliary to or supplemental of the affiliates' service, the statute is not only meaningless, but the supposed protection against railroad invasion of the field of motor carrier service is written out of the Act. But this is the clear basis of the Commission's decision here for it stated that the operations it was approving "are completely in conformity with the concept of express service, upon which concept we would turn our backs if we were to interpret the rail-haul restriction as requiring literally a complete prior or subsequent movement over steel rails," and concluded, "It is, perhaps, thus unfortunate that many of REA's certificates were obtained in circumstances that prohibit the traffic involved to move wholly free of the rail service with which it was proven to be associated; but we are powerless here to remedy that situation." Appendix B. p. 73, *infra*

Contrary to the District Court's conclusion, the Commission did not base its grant of motor carrier authority

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[5] This reasoning is strikingly similar to that used by the Commission in awarding unrestricted trucking rights to a railroad's motor subsidiary, which action was reversed by this Court's decision in *A.T.A.*: "On the other hand, insofar as Southern Pacific points are concerned, the authority sought represents no more than a request by the Southern Pacific to perform truck transportation, albeit contract-carrier transportation, to the same points it serves as a rail carrier." *Pacific Motor Trucking Co. Extension—Oregon*, 77 M.C.C. 605, 620 (1958).

without rail-oriented restrictions on any finding of special circumstances in the *Rock Island* case sense. The mention of the special circumstances test cited by the District Court to support its conclusion apparently was part of the "guidelines" being drawn for future application in Railway Express cases.[6] Appendix B, p. 85, *infra* And the lower court should not have assumed that special circumstances exist in the absence of a proper finding by the Commission, *A.T.A.* case, *supra*, at 364 U.S. 13-14, since "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities and Exchange Com.* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

Despite its recognition that the principles set out in its opinion could "greatly facilitate the expansion of REA operations by motor vehicle," Appendix B, p. 83, *infra*, the Commission concluded that Railway Express motor vehicle operation in the manner indicated does not appear to present any real threat of undue competition to the operations of independent motor carriers generally,[7] while the diminution of expedited rail service does pose a threat to the continued existence of a nationwide express service. Appendix B, p. 85, *infra* But this conclusion fails to

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[6] Even assuming, *arguendo*, that the Commission found "special circumstances" in that there is a public need for some express service which the existing independent motor carriers are unable to meet because of commodity limitations in their certificates, such a finding would not accord with the Congressional policy. Having never authorized the independent motor carriers to perform the service, unlike the situation in the *Rock Island* case, the Commission can hardly complain that they are "unwilling" to perform it.

[7] On this point, the District Court referred to the Commission's expressed willingness to review Railway Express cases for undue competition and suggested that the future conditions limitation will furnish protection. Appendix A, p. 37, *infra* But, as this Court pointed out in the *A.T.A.* case, at 364 U.S. 12, such a condition "obviously is no restriction at all on present operations, and hence can hardly be said to limit the trucking to an auxiliary or supplemental service."

take account of the ownership of Railway Express by the railroads. Under the Commission's conclusion here, a railroad may cut down on its rail service and thereby create the situation entitling its affiliate to additional motor vehicle authority. The lack of any real *public* need for this service by Railway Express is perhaps best exemplified in the Sub-No. 1515 proceeding where Railway Express seeks motor carrier authority to replace, not discontinued rail service, but the motor service of a railroad affiliate which has replaced its parent's discontinued train service. Appendix B, p. 46, *infra* The Commission's report fails completely to discuss or even recognize the inconsistency of discontinuing train service for lack of need, including presumably the need of Railway Express, and yet granting motor authority because of the supposed public need for expedited service such as was discontinued. The Commission's report, if not reversed, will legitimatize this railroad "boot-strap" procedure whereby their own action in discontinuing rail service will justify the grant of additional motor carrier authority to their nationwide affiliate.[8]

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[8] It must be emphasized that elimination of rail passenger service is not the only reason for the recent flood of Railway Express motor carrier applications. In MC-66562 (Sub-No. 1903), *Railway Express Agency, Inc., Ext.—New London, Ohio*, the Joint Board's report served February 4, 1963, aff'd by unprinted Decision and Order of the Commission, May 13, 1963, also approved a certificate without rail-haul restrictions based on a reduction of motor service by a rail-affiliated motor carrier. In MC-66562 (Sub-No. 1902), *Railway Express Agency, Inc., Ext.—Henniker, N.H.*, (1963) (not printed), pending on petition for reconsideration, Railway Express seeks a certificate to replace a less desirable *motor* authority it now has and to replace the motor service of another railroad affiliate. In MC-66562 (Sub-No. 1869), *Railway Express Agency, Inc., Ext.—Buffalo*, pending on exceptions to the Examiners' report, the passenger train was not discontinued, but only the express car was dropped from it. In MC-66562 (Sub-No. 1754), *Railway Express Agency, Inc., Ext.—Winchester, Va.* (1963), pending on petition for reconsideration, and in MC-66562 (Sub-No. 1786), *Railway Express Agency, Inc., Ext.—Huntingburg* (1963) (not printed), the basis of the applications was dissatisfaction

3. One effect of the Commission's new construction of the restrictions usually placed in the certificates of railroad affiliates, is to enlarge the operations authorized in outstanding certificates containing such restrictions. Until this report, such a restriction has been interpreted as requiring an immediately prior or subsequent movement over steel rails, *supra*, n. 4, and motor operations so restricted were thus confined to those auxiliary to or supplemental of the rail operations which they feed. Now, for the first time, the Commission concluded that the restriction only requires that the traffic moved thereunder is not transported in a wholly-motor movement. Railway Express has a nationwide network of motor carrier authorities, many of which contain a rail-haul restriction. Under this new interpretation, numerous authorities containing such restrictions may be "tacked" together, permitting substantial line-haul highway movements, provided only that some small segment of the total movement is over steel rails. In many cases, in a complete perversion of the purposes of the Congressional policy, the rail operations will become auxiliary to and supplemental of the motor operation.

This is not mere speculation about possible far-distant future conditions, since, although this record contains no actual count of outstanding Railway Express certificates, it notes that from 1939 to the time of the proceeding before the Commission, Railway Express has filed approx-

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with existing train schedules. In *Railway Exp. Agency, Inc., Ext. —Sioux City-Mitchell*, 91 M.C.C. 836, 838 (1963), the Commission approved the application after finding that Railway Express's "dissatisfaction with [the train] service as well as its opinion that it could provide a more economical and efficient service by motor occasioned the instant application as well as that for the temporary authority under which it presently operates." In view of this Court's recent expressions in this area, it is hard for us to swallow the proposition that one rail subsidiary, Railway Express, should receive unrestricted motor-carrier rights because other rail motor subsidiaries, or other railroads themselves, render less than an adequate transportation service.

imately 1,700 applications for motor carrier authority, Appendix B, p. 54, *infra*, and several hundred certificates have been granted. As to the tacking possibilities, the report notes that, of the 34 points proposed to be served under the five authorities in issue, 14 are service points common to 37 other certificates now held by Railway Express. Appendix B, p. 41, *infra*

This enlargement of operations permitted under outstanding certificates would be accomplished without any showing as required by § 207(a) of the Act, 49 U.S.C. § 307(a), that the present or future public convenience require the service Railway Express will be permitted to perform.

4. While recognizing that the meaning of the term "general commodities moving in express service" is basic to a consideration of Railway Express's operations, the Commission failed to apply the meaning which it gave to the operations proposed. The correct application of the term "express service" to the proposed operations is essential both in deciding whether, under § 207(a) of the Act, 49 U.S.C. § 307(a), the proposed service is required by public convenience and necessity, and in determining whether special circumstances exist to justify unrestricted motor operations within the meaning of the *Rock Island* case test, *supra*: "that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished except where it suited their convenience."

The Commission reviewed the history of this term which it stated it has always thought of as connoting certain distinct characteristics. The term "express service" has been defined with remarkable consistency through the line of Commission and court decisions and, as the Court noted, Appendix A, p. 30, *infra*, appellants here did not quarrel with the definition assigned by the Commission, and do not do so now. However, to avoid misunderstanding,

it should be noted that the Court followed the quotation of the Commission's definition with that agency's conflicting statement that "express service is not susceptible of precise definition" because its attributes must be judged in comparison with the services and rates of ordinary freight carriers. Appellants concurred in the Commission's definition of "express service;" they did not and do not concur in the Commission's caveat that the term cannot be precisely defined.

The Commission refused, on the ground of lack of need, to restate the definition of "express service" so as to set at rest any question whether there is an unsatisfied public need for the service that Railway Express proposes. But, based apparently on its assumption that the term cannot be precisely defined, the Commission also refused to apply the long-standing definition of "express service" to the operations which Railway Express proposes to perform. The Commission's treatment of this problem is exemplified by contrasting certain statements in its report. At Appendix B, p. 56, *infra*, it quoted from *Railway Exp. Agency, Inc., Extension—Durant-Kosciusko*, 34 M.C.C. 111, 114 (1942), to describe the "distinct characteristics" of express service:

> We have consistently recognized certain fundamental differences between express service and ordinary freight service, both by rail and by motor vehicle. Express service contemplates the expedited handling and transportation of comparatively small individual shipments often of considerable value and generally at premium rates. This service may be said to be competitive with ordinary freight service to a very limited extent only, and the mere fact that it can and does survive in competition with general freight service conducted generally at lower rates is indicative of the inherent difference between the two services . . . speed in handling is one of the principal characteristics of express service. . . .

But at p. 84, the Commission stated:

> We do not view favorably the argument generally made by common carriers of ordinary freight that an REA application for motor carrier operating authority should turn on a showing by REA that it will transport over the route involved a significant number of commodities requiring, by nature, special handling. This argument loses sight of the fundamental function of an express service. It is a premium service utilized by shippers whenever speed or special handling, rather than rates, are of importance.

Nowhere in the report does the Commission explain how a contention that there must be a showing of need for "special handling" conflicts with a test of need for "speed or special handling."

And at p. 85, dealing specifically with the Sub-Nos. 1515 and 1687 applications, the Commission said:

> While much of this traffic is, as pointed out by certain protestants and by ATA in their respective exceptions, not traffic which inherently requires special handling of the type excluded from the authorities of, or otherwise not normally handled by, the protestants, it is, nevertheless, traffic which we may judge to be bona fide express traffic through its movement, in the past, in applicant's premium service.

But there is no finding by the Commission, nor is there any evidence in the record to support a finding, that Railway Express's past service over the routes involved was premium express service.

The treatment of the question of "premium rates" by both the Commission and the Court exemplifies their approach to the question whether Railway Express is performing or proposing to perform an express service. Early in the history of regulation of express service, the Commission recognized that it is a service superior to that furnished by ordinary freight carriers and contemplating, as it did, the expedited handling and transportation of

comparatively small shipments, it is a premium service commanding premium rates. The attribute of premium service at premium rates has always been one of the indicia of true express service. In the quotation from the *Durant-Koscuisko* case, *supra*, the Commission noted that the fact that express service can and does survive in competition with "general freight service conducted generally at lower rates" is indicative of the inherent differences between the two services. In *Railway Exp. Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363, 371 (1941), express service was described as "an expedited form of transportation for which the shipper pays a premium rate whenever time and security, rather than rates, are of primary importance."

In *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 582 (1955), summarizing the attributes of express service, the Commission said, in part:

> It is readily apparent in the foregoing summary that express carriers provide additional services under less favorable operating conditions than do carriers providing ordinary freight services. In the circumstances it follows that the level of their rates for express service is necessarily higher. The fact that express carriers, charging premium rates, are able to compete with and survive the competition of the carriers providing an ordinary freight service confirms the higher type of service expected of, and supplied by them. Thus while premium rates are, of course, not part of the service of express carriers they nevertheless are an attribute of such service without which it is unlikely that any service should be so classified.

The Commission and the Court both treated appellants' references to the rates for the services involved as an attack on the legality of Railway Express's rates, rather than as one of the elements of the definition of express service to be applied to determine whether the service proposed is, in fact, premium express service.

Numerous supporting shipper witnesses admitted that their support of Railway Express was to secure lower rates, but the Commission, with District Court approval, refused to consider this evidence as indicative that what Railway Express is performing and proposes is not express service but ordinary freight service. At oral argument before the Commission, appellants sought to have the Commission take official notice of rate evidence in its official files, but the Commission refused to consider this material.

Plaintiffs' brief to the District Court cited a number of Railway Express tariffs then on file with the Commission to show that the agency had available in its own official records evidence that Railway Express seeks to render service on shipments up to 20,000 pounds at rates at or below the level of rates of the general freight carriers.[9] This is evidence of which the Commission can and should take official notice. *Joynes* v. *Pennsylvania R. R.*, 17 I.C.C. 361, 366 (1909). It is evidence within the Commission's own knowledge that Railway Express is holding out ordinary-freight rates for what must be presumed to be ordinary-freight service. *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 576, 582 (1955). The Commission cannot be allowed to so compartmentalize its knowledge that when it sits in rate proceedings, it has certain information available to it, and when it hears application cases, it has other information available, but the two funds of information are never intermingled. This is completely contrary to the *Joynes* case doctrine that the Commission has a right of official notice which extends "to the entire range of its experience with transportation problems and embraces all the knowledge that it has gathered from any source." The Commission's duty to utilize information within its experience and knowledge

[9] E.g., Railway Express Commodity Tariff 33-B, I.C.C. No. 8550, effective August 1, 1962; Supplement 19 to Railway Express Tariff 37, I.C.C. No. 8499, effective March 31, 1963; Supplement 2 to Railway Express Tariff 44, I.C.C. No. 8513, effective January 7, 1963.

to carry out the Congressional scheme of transportation regulation is part and parcel of that "expertise" which justifies agency regulation.

In this decision, the Commission refused to measure the proposed service against its long-standing definition of express service. In disclaiming ability to state a precise definition of that term, the Commission conceded that its "attributes of expediency, premium rates, and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight." But the Commission refused even to apply this comparative test to determine whether the proposed service is truly superior to that provided by the ordinary freight carriers.

5. As a result of the Commission's decision, the independent general freight carriers are faced with the competition of a nationwide motor carrier, financed by the major railroads of the country, and unrestrained by any meaningful restriction on the operations which it will be able to perform. The Commission's refusal to apply its long-standing definition of express service to the operations proposed is contrary to the provisions of § 207, 49 U.S.C. § 307, requiring proof that the public convenience and necessity require the operations proposed. This refusal to test the proposed service against the recognized definition also precludes the existing independent carriers from showing that no "special circumstances" exist within the meaning of the *Rock Island* test, *supra;* since, unless the proposed service is measured against and shown to be different from and superior to the service they perform, the independent carriers are barred from showing that they are, in fact, meeting all reasonable public need.

The Commission's novel theory that Railway Express should be treated differently from other railroad affiliates in passing on its applications for new motor carrier authority will, if sustained by the Court, completely nullify the Congressional intent to recognize and preserve the inherent advantages of motor carrier service by restricting

entry into that field of transportation to the railroads. While the Commission and the courts have recognized the continuing validity of that policy with respect to the motor operations of individual railroads and railroad affiliates and have limited their motor operations in relatively circumscribed areas to services auxiliary to and supplemental of the parents' rail operations, the Commission would here abnegate the policy as to the nationwide affiliate of the country's major railroads collectively. If this decision is allowed to stand, there will be little need for individual railroads to seek motor carrier authority since they will have a nationwide motor carrier affiliate, unrestricted to auxiliary and supplemental operations, engaged in general commodity general freight service in direct, all-out competition with the existing independent motor carriers.

This is the real vice of the Commission report. Where, because of its multiple-rail affiliation, the anti-monopoly policy should be applied even more zealously, it is relaxed to the point of ineffectuality.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard R. Sigmon, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the third day of January, 1964, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., to Robert B. Hummel, Chief, Appellate Section, Anti-Trust Division, Department of Justice, Washington 25, D. C., and to W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U. S. Post Office & Courthouse Building, Boston 9, Massachusetts.

2. On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and H. Neil Garson, Esq., Associate General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Railway Express Agency, Inc., intervening defendant, by mailing copies, in duly-addressed envelopes, with postage prepaid, to William J. Taylor and William H. Marx, Esqs., 219 East 42d Street, New York 17, New York, and to J. Joseph Maloney, Jr., Esq., 31 Milk Street, Boston 9, Massachusetts.

RICHARD R. SIGMON